No. 18398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMY CORPORATION, a California corporation,
Appellant,

vs.

ROBERT A. RIDDELL, individually and as District Director of Internal Revenue, Los Angeles, California,
Appellee.

APPELLANT'S REPLY BRIEF.

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Comments Upon Appellee's "Statement."

Commencing near the top of page 4 of appellee's brief, under the heading "Statement", appears the following:

> ". . . Pursuant to this stipulation the Superior Court of California *immediately* ordered the dismissal of the receiver and the termination of the receivership proceedings, and further ordered the return to the taxpayer of all of its assets then in the possession of the receiver. *The Director's claim for the assessed taxes was, therefore, never paid. . . .*" (Emphasis added.)

The italicized portions of the foregoing quotation are purely argumentative and should have been set forth, if at all, more appropriately under appellee's argument rather than under a statement of the facts of the case.

However, even as argument, these assertions are erroneous.

1. There is no allegation in the complaint or in the record on this appeal which justifies appellee's foregoing use of the word "immediately" in an argumentative manner to assert, by implication, that the conduct of the receivership court lacked due judicial consideration and care.
2. The Director's claim was not paid *not* because the receivership proceedings were terminated, as asserted by appellee, but because his claim was never adjudicated or allowed.

Near the bottom of page 4 of his brief appellee states:

> ". . . The grounds for this determination by the District Court are set forth as follows in its conclusion of Law [R. 47]:
>
> 1. The District Director of Internal Revenue at Los Angeles, California, made valid assessments against plaintiff [taxpayer] for deficiency income taxes for the fiscal years ending August 31, 1956, and August 31, 1957. . . ."

While this is a correct *recital* of one of the District Court's conclusions of law, it should be pointed out that by the use of the word "valid" the District Court could only have had reference to the fact that, upon the appointment of a receiver for appellant, appellee was authorized, under the provisions of Section 6871 of the Internal Revenue Code (1954), to make an assessment, if he correctly determined that there was an income tax deficiency. However, such use of the word "valid" could *not* mean that the District

Court concluded that the appellee correctly determined that there was any income tax deficiency because *this issue* was not before the District Court at all. There is no allegation in the complaint and there is no evidence at all in this case which would support any such conclusion. There is no evidence at all in this case as to the merits of the determination by appellee that there was any income tax deficiency in any amount.

I.

Section 6213 of the Internal Revenue Code (1954) Prohibits the Collection of Any Additional Income Tax Which Appellee Claims Is Owed.

Appellee erroneously contends that Section 6871 *supersedes* Section 6212 and 6213 of the Internal Revenue Code (1954). In this connection, appellee then erroneously argues that once an assessment of an income tax deficiency is made under Section 6871 the injunctive provisions of 6213 cannot thereafter be used to enjoin the collection of that income tax. Before any *income* tax (in addition to that which the taxpayer assesses to himself on his return) can be *collected*, the Director must bring himself within the provisions of either Sections 6212 and 6213 or of Section 6861 or of Sections 6871 and 6873. The record in this case is clear that no notice or assessment has been made under Section 6212 and 6213. The record in this case is also clear that there was no jeopardy assessment made under Section 6861. The only assessment made in this case was made under Section 6871. But any income tax deficiency assessed under Section 6871 can only be *collected,* pursuant to Section 6873, provided that the claim is *allowed* in the receivership or bankruptcy proceeding.

While Section 6871 provides for an immediate *assessment* of income tax deficiencies where the taxpayer is in receivership, Section 6871 contains *no provision for any levy or collection* of such taxes so assessed. Section 6871 merely provides that:

> ". . . claims for the deficiency . . . may be *presented for adjudication* in accordance with law, to the court before which the . . . receivership proceeding is pending. . . ." (Emphasis added.)

The only provision in the Internal Revenue Code (1954) for the *levy* or *collection* of such claimed income tax deficiencies assessed under Section 6871 is contained in Section 6873. Section 6873 provides that:

> ". . . Any portion of a claim for taxes *allowed* in a receivership proceeding . . . which is unpaid shall be paid by the taxpayer . . . after the termination of such proceeding." (Emphasis added.)

The claim in this case was not allowed. Accordingly, the collection of the asserted income tax deficiency which appellee threatens to make is *not* within any exception to Section 6213. Therefore, the only possible way in which appellee could legally *collect* the asserted income tax deficiencies, would be pursuant to the provisions of Sections 6212 and 6213. Not having given the required notice under Section 6212, the provisions of Section 6213 prohibit the collection of the additional income tax which appellee claims is owed.

II.

Section 7421(a) of the Internal Revenue Code (1954) Does Not Preclude This Action.

Appellee asserts that Section 7421(a) precludes appellant from maintaining the present action.

Section 7421(a) appears as follows:

> "(a) Tax.—Except as provided in Sections 6212-(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"

Section 7421 is a *general* statute which relates to *all* Federal taxes. Section 7421 by its own express provisions, does *not* apply to an action properly brought under the provisions of Section 6213(a).

None of the cases cited by appellee support his contention that Section 7421(a) precludes this action by appellant.

The case of *Enochs v. Williams Packing & Navigation Co., Inc.,* 370 U. S. 1, 62-2 U. S. T. C. ¶9545 (1962) cited by appellee at pages 11, 12, and 13 of his brief, does not support his argument. That case involved the collection of *social security* and *unemployment* taxes. Section 6213, of course, has no application to taxes of that sort and was not involved in that case. Furthermore, the court, in that case, stated (at p. 7) in discussing the purpose of Section 7421(a) as follows:

> ". . . Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the Nut Margarine Case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. . . ."

In the present case, the attempted collection by appellee is without any authority whatsoever. Furthermore, the time for appellee to issue a "ninety day letter" under the provisions of Section 6212 has expired. Thus, there is no way for appellee to establish an assessment under which he could prevail ultimately in his attempt to collect the asserted income tax deficiencies which he claims are owed. In addition, the present case, unlike the *Enochs* case, *does* involve the attempted collection of *income* taxes and Section 6213 *is* involved in the present case. *A fortiori,* then, the purpose of the general Section 7421(a) has no application in the present case.

The case of *Cohen v. Gross,* 63-1 U. S. T. C., ¶ 9395 316 F. 3d 521 (C. C. A. 3rd, 1963) cited by appellee at page 12 of his brief does not support his argument. In that case the claim for income taxes filed in the bankruptcy proceedings *was adjudicated* and *allowed.* In the present case, the claim for additional income taxes was *never* adjudicated or allowed. Moreover, there is a very strong implication contained in the opinion of the Third Circuit Court of Appeals in the *Cohen v. Gross* case that where a claim for income taxes has *not* been allowed in a bankruptcy or receivership proceeding, the injunctive provisions of Section 6213 are available to the taxpayer to prevent collection of such taxes unless the Director issues a timely "ninety day letter" pursuant to the provisions of Section 6212. The court in the *Cohen v. Gross* case stated at page 88,049:

> ". . . the taxpayer himself recognizes this to the extent of conceding that by seeking relief in bankruptcy he subjected himself to the immediate as-

sessment of any tax deficiency *and the adjudication* of his tax liability by the bankruptcy court, instead of the procedure prescribed by Section 6213. But beyond that, once a tax claim has been asserted *and allowed* in a bankruptcy proceeding, though not collected therein because of lack of assets, neither the language of the Code nor the sense of the situation suggests that any of the procedure of Section 6213 again becomes prerequisite to the establishment and collection of that particular tax liability. Indeed, we think that the contrary is implied by a statutory provision that *once a tax claim has been allowed* in bankruptcy, the government is empowered to collect, by levy upon the taxpayer's after acquired property, any portion of the claim that has not been satisfied out of the bankrupt estate. 1954 Code §6873; See Treas. Reg. §301.6873-1.

We conclude, therefore, that the requirements of Section 6213 and the limited power to enjoin premature assessments which are subject to those requirements are simply not relevant to the situation of the present taxpayer. . . ." (Emphasis added.)

". . . it is clear that that power should not be exercised unless the imposition is unquestionably *illegal. Enochs v. Williams Packing & Nav. Co.,* 1962 [62-2 USTC ¶9545], 370 U. S. 1. In this case it is simply impossible for the taxpayer to show such clear illegality. The deficiencies determined against him have already been approved by the bankruptcy court which had jurisdiction to determine their amount and legality. . . ."

The case of *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498 (1931), cited at page 13 of appellee's brief, does not support appellee's argument. The tax involved in that case was an *excise* tax upon oleomargarine and, of course, the predecessor section of Section 6213 had no application in that case. The Collector of Internal Revenue in that case sought reversal of judgment in favor of the taxpayer permanently enjoining the Collector from attempting to collect the excise tax. The Collector argued in support of his appeal:

> ". . . that the statute forbids injunction against the collection of the tax even if erroneously assessed; that this assessment was made by the Commissioner under color of his office, was not arbitrary or capricious and that, if there is any exception to the application of §3224, U. S. C. title 26, §154, this case is not within it. . . ." (at p. 506.)

In that case, the United States Supreme Court held that the taxpayer was enitled to the permanent injunction pointing out (at page 508) that:

> ". . . It is elementary that tax laws are to be interpreted liberally in favor of taxpayers. . . ."

and that:

> ". . . Doubts must be resolved against the government and in favor of taxpayers."

The court in that case, with reference to the predecessor section of the present Section 7421(a), stated at pages 509 and 510:

> ". . . This court has given effect to §3224 in a number of cases. . . . It has never held the rule

> to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. . . . This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent and therefore the reasons underlying §3224 apply, if at all with little force. . . ."

In the case at bar, the injunction is not sought upon the mere ground of illegality because of error in the *amount* of the deficiency determined by appellee. Appellant concedes that the as yet unresolved issue of the merits of the asserted deficiency cannot be litigated in this action. Appellant seeks an injunction on the ground that the deficiency asserted by appellee "can by no legal possibility" be validly or legally collected because such collection is prohibited by Section 6213.

Matthews v. Rodgers, 284 U. S. 521 (1931), cited by appellee at page 13 of his brief, does not support his argument. There, the tax involved was a *State* annual *license* or *privilege* tax. In that case neither the predecessor section of Section 7421(a) nor the predecessor section of Section 6213 was at all involved. In that case, the taxpayers sought to enjoin the collection of the taxes upon the ground that it was an unconstitutional burden on interstate commerce. A judgment granting such injunction was reversed by the United States Supreme Court upon the ground that the taxpayers had an adequate remedy under the applicable state law.

III.

Presentation of Appellee's Claim for Adjudication in the Receivership Proceedings Was the Responsibility of Appellee.

As an alternative argument, appellee takes the position that (1) it was the responsibility of *appellant* to see to it that the claim filed by *appellee* in the receivership proceedings was prosecuted and adjudicated by the receivership court and that (2) the appellant not having done so, appellee should not now be enjoined from collecting the claim that was never adjudicated or allowed. Finding that the Director's failure to prosecute his claim in the receivership proceeding has placed him in an untenable position in this case, the Director, by this argument, attempts to place upon the taxpayer the fault of the *Director* for not having the *Director's* claim adjudicated in the receivership proceeding.

Appellee erroneously states at page 8 of his brief:

> ". . . Although these state court proceedings lasted for about three years, the taxpayer was never dissolved and the receiver never distributed the taxpayer's assets to its creditors and others, *owing to a stipulation by the taxpayer's stockholders calling for the termination of the receivership proceedings. . . .*" (Emphasis added.)

and at pages 14 and 15 of his brief:

> ". . . The taxpayer chose (through stipulation of its stockholders) not to avail itself of this opportunity and, instead, chose to terminate those proceedings before the claims of its creditors could be approved and paid. In other words, by assessing the tax and filing a claim with the receiver the

Director did all that he was authorized and permitted to do by statute; the loss of judicial review was solely the taxpayer's fault and it should not now be permitted to complain. . . ."

The foregoing statements and arguments by appellee, unsupported by the citation of any authorities, are erroneous because:

(a) Preliminarily it should be pointed out that it does not appear from the record in this appeal whether or not there was *any adjudication* of any claim filed in the receivership proceeding by anyone other than appellee. Because it does not appear that any of the other claims filed was adjudicated and allowed, it is not proper for appellee to refer to any such claimant as a "creditor" of appellant;

(b) The authorities cited by appellant in its opening brief make it clear that a claimant in a receivership proceeding not only *is* authorized and permitted by law to prosecute the claim which he files in such proceeding but, that if he fails to do so, he is precluded from thereafter asserting that claim in another proceeding.

(c) Prior to the termination of the receivership proceedings appellee had *three years* within which to prove, if he could, the merits of the deficiencies which he determined and assessed under Section 6871.

(d) As was shown in appellant's opening brief, even after the receivership proceedings were terminated, appellee, under the law of the State of

California had another *six months* within which to petition the receivership court to adjudicate his claim on the merits.

(e) Appellee's argument really assumes that if it had been adjudicated on its merits, appellee's claim would have been allowed! If such assumption could be indulged in, there would never be any need for the provision of Section 6871 that such tax claim actually be adjudicated.

(f) The matter of having his claim adjudicated in his favor was a condition precedent to appellee's right to collect any part of the deficiencies which *he* determined under Section 6871. It is a novel but erroneous argument that appellee asserts: that the *taxpayer* should have satisfied this condition *for the Director* by prosecuting the *Director's* claim to a final adjudication in the receivership proceeding.

(g) There was no legal or equitable obligation on the part of the receivership court, the receiver, appellant or appellant's stockholders to keep the receivership proceedings open indefinitely beyond the time when the purpose for such proceedings ceased to exist. This is especially true when appellee *still* asserts (at pages 14 and 15 of his brief, quoted above) that he would never have taken any steps to have his claim adjudicated in the receivership proceedings beyond the mere filing of the claim.

(h) Neither appellant nor appellant's stockholders terminated the receivership proceedings. That termination was effected by the order of the receiver-

ship court after due consideration by that court of the record of those proceedings which, of course, included, among other things, the stipulation of appellant's stockholders. [R. 4.]

(i) Appellee never appealed from that order of the receivership court.

IV.

Treasury Regulations, Section 301.6873-1(b) Does Not Authorize Appellee to Collect the Additional Income Taxes Which He Claims Are Owed.

Appellee at pages 15 and 16 of his brief erroneously cites Treasury Department Regulations §301.6873—1(b) as his authority to collect the additional income taxes which he claims are owed by appellant. But that regulation is no authority for such levy. It reads, in pertinent part, as follows:

> "(b) Section 6873 is applicable only where a claim for taxes is allowed in a receivership proceeding or under the Bankruptcy Act. Claims for taxes . . . may be collectible in equity or under other provisions of law although no claim was allowed in the proceeding *because, for example, such items were not included in a proof of claim filed in the proceeding or no proof of claim was filed. . . .*" (Emphasis added.)

In the case at bar a proof of claim *was* filed and the "items" which appellee now threatens to collect *were all included* in that proof of claim which *was* filed. Accordingly, §301.6873-1(b) has no application to the facts of this case.

Conclusion.

Appellee should be enjoined from collecting, or attempting to collect, either of the asserted deficiencies.

Respectfully submitted,

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By RONALD C. ROESCHLAUB,
and
WALTER J. MCLELLAN,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER J. MCLELLAN